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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 In re VERIFONE HOLDINGS, INC.
20 SECURITIES LITIGATION

) Master File No. 3:07-cv-06140-MHP

) CLASS ACTION

21 This Document Relates To:

22 ALL ACTIONS.

) THE NATIONAL ELEVATOR INDUSTRY
) PENSION FUND'S OMNIBUS
) OPPOSITION TO ALL OTHER MOTIONS
) FOR APPOINTMENT AS LEAD COUNSEL

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Day Trading11

The National Elevator Industry Pension Fund (hereinafter, the “National Elevator Fund”) respectfully submits this memorandum of law in further support of its motion for appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), and in opposition to all other motions. 15 U.S.C. §78u-4(a)(3)(B).

I. INTRODUCTION

In addition to the National Elevator Fund’s motion, seven other lead plaintiff motions were filed.¹ Of those seven, only two claim larger losses than the National Elevator Fund: (i) The Phoenix Insurance Company, Ltd; Prisma Provident Funds, Ltd.; Prisma Mutual Funds, Ltd., Harel Insurance Co., and Harel Pia Mutual Funds (the “Harel Group”), and (ii) CLAL Finance Batucha Investment Mgmt., Ltd; and Direct Investment House (Providence Funds) Ltd. (the “Batucha Group”) (collectively, the Harel Group and the Batucha Group are defined herein as “the Israeli Entities”).

Among all the applicants, however, the National Elevator Fund should be deemed the “most adequate plaintiff” because it has the largest financial interest of any proposed lead plaintiff that *also* satisfies the requirements of Rule 23. *See generally In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002); *In re Gemstar-TV Guide Int’l, Inc. Sec. Litig.*, 209 F.R.D. 447 (C.D. Cal. 2002). Moreover, as the domestic institutional investor with the largest losses before the Court, the National Elevator Fund occupies a preferred position among those seeking lead plaintiff appointment in this case. *See Schriver v. Impac Mortgage Holdings, Inc.*, 2006 U.S. Dist. LEXIS 40607, at *14 (C.D. Cal. 2006) (“The PSLRA’s presumption that the most adequate plaintiff is the plaintiff with the largest financial interest reflects a congressional intent that institutional investors should be appointed lead plaintiff wherever possible . . .”).

Although the Harel and Batucha Groups claim larger losses, their motions should be denied for a host of reasons. First, they have not presented any evidence, in the form of declarations or otherwise, demonstrating that they are legitimate and cohesive groups with the “joint decision-making” ability consistent with the language and spirit of the PSLRA. *See Impac*, 2006 U.S. Dist.

¹ On February 14, 2008, Police and Fire Retirement System of the City of Detroit filed a Notice of Withdrawal for Appointment of Lead Plaintiff and Approval of Its’ Selection of Lead Counsel. (Docket #62).

LEXIS 40607, at *28 n.10 (“there is no reason the Impac/IMH Group or its constituent groups could not have submitted such evidence in connection *with their initial motions*”).² A group’s “failure to provide significant information about the identity of the members other than a conclusory statement of names, transactions for purchase of securities, and largest financial interest should result in denial of their application for appointment as Lead Plaintiff.” *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 413 (S.D. Tex. 2000); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 586 (N.D. Cal. 1999).

Second, neither the Batucha Group nor the Harel Group have submitted any evidence demonstrating that a judgment by this Court will be given *res judicata* effect in Israel. *See Borochoff v. Glaxosmithkline PLC*, 246 F.R.D. 201 (S.D.N.Y. 2007). Third, based on the present record the Batucha and Harel Groups’ authority to claim investment losses and standing to bring securities class actions is uncertain. *In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1026 (N.D. Cal. 1999). Finally, and most critically, the Batucha Fund covered defendant VeriFone during the Class Period – a fact which will allow defendants to persuasively argue that the Batucha Fund is subject to unique defenses. *See In re Indep. Energy Holdings PLC, Sec. Litig.*, 210 F.R.D. 476, 481 (S.D.N.Y. 2002) (“Courts have routinely found a disqualifying unique defense where the potential named plaintiff has had a direct or personal relationship with a board member or officer of the issuing company.”).

Under *Cavanaugh*, all other remaining motions should be denied because their claimed losses are significantly less than the National Elevator Fund’s loss of over \$2 million.

II. ARGUMENT

A. The PSLRA’s Lead Plaintiff Provisions

1. Governing Law

In *Cavanaugh*, the Ninth Circuit set forth the process district courts are to apply in determining who is the “most adequate” plaintiff. 306 F.3d at 729-33. First, “the district court must consider the losses allegedly suffered by the various plaintiffs” to determine which one has the

² Unless otherwise noted all emphasis is added and citations are omitted.

largest financial interest. *See id.* at 729-30. In determining financial interest, “the court may select accounting methods that are both rational and consistently applied.” *Id.* at 730 n.4. Once the district court determines which movant has the greatest loss, it “must then focus its attention on *that* plaintiff and determine, *based on the information [it] has provided in [its] pleadings and declarations*, whether [it] satisfies the requirements of Rule 23(a).” *Id.* at 730 (emphasis added and in original).

“The second additional factor that the court should consider in making [its] threshold adequacy determination will arise *only* when the movant with the largest interest in the relief sought by the class is a group rather than an individual person or entity.” *In re Cendant Corp. Litig.*, 264 F.3d 201, 266 (3d Cir. 2001). “[A] group is not entitled to presumptive lead plaintiff status unless it ‘otherwise satisfies’ Rule 23, which in turn requires that it be able to ‘fairly and adequately protect the interests of the class.’ If the court determines that the way in which a group seeking to become lead plaintiff was formed or the manner in which it is constituted would preclude it from fulfilling the tasks assigned to a lead plaintiff, the court should disqualify that movant” *Id.*

Finally, if the plaintiff with the largest loss *also* satisfies Fed. R. Civ. P. 23 (“Rule 23”), that plaintiff becomes the presumptive lead plaintiff. *Id.*; *In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 377 (E.D. Va. 2003) (“a movant’s financial interest is just a beginning point, and courts acknowledge that they must also consider the movant’s ability and willingness to adequately represent the class”). *Richardson v. TVIA, Inc.*, 2007 U.S. Dist. LEXIS 28406, *16-*20 (N.D. Cal. 2007).

2. Legislative History

Congress enacted the PSLRA to encourage courts to appoint as lead plaintiffs shareholders, preferably institutional investors, with: (1) large financial stakes in the outcome of the litigation; and which (2) possess the requisite resources and sophistication to manage and supervise class counsel. *See* H.R. Conf. Rep. No. 104-369 (1995), *reprinted in* 1995 U.S.C.A.A.N. 679, 689-90, 733 (“The Conference Committee believes that increasing the role of institutional investors . . . will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions.”); *Cavanaugh*, 306 F.3d at 738 (PSLRA was designed to “promote the goal of attracting institutional investors” as lead plaintiffs).

1 The National Elevator Fund is such an investor. Based in Pennsylvania, the Fund oversees
 2 nearly \$3 billion in assets, has experience serving in a fiduciary capacity and possesses the necessary
 3 sophistication and resources to simultaneously prosecute this case and oversee class counsel. *See*
 4 *Yousefi v. Lockheed Martin Corp.*, 70 F. Supp. 2d 1061, 1066 (C.D. Cal. 1999) (“Ideally, courts will
 5 appoint institutional investors with large holdings in the stock as lead plaintiff.”).

6 While the National Elevator Fund’s status as an institutional investor is not *by itself*
 7 controlling under the PSLRA, *see, e.g., Tanne v. Autobytel, Inc.*, 226 F.R.D. 659 (C.D. Cal. 2005),
 8 the Court should give added weight to this fact as both of the other movants with larger losses are
 9 unrelated and loose groups of atypical investors. *See Weisz v. Calpine Corp.*, 2002 U.S. Dist.
 10 LEXIS 27831, at *29 (N.D. Cal. 2002) (“As an institutional entity, Local 1298 is preferable to an
 11 individual plaintiff”); *In re Espeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 100 (S.D.N.Y. 2005) (“a
 12 group of unrelated investors should not be considered as lead plaintiff when that group would
 13 displace the institutional investor preferred by the PSLRA”).

14 3. Groups of Plaintiffs

15 The PSLRA expressly permits a “person *or* group of persons” to be appointed lead plaintiff.
 16 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). “Where a statute fails to define a key term, this court’s ‘duty, in
 17 matters of statutory construction, is to give effect to the intent of Congress.’” *Padilla v. Lever*, 463
 18 F.3d 1046, 1057 (9th Cir. 2006). The PSLRA does not define what a “group” can or should be and,
 19 in *Cavanaugh*, the Ninth Circuit expressly left it to the district courts to decide whether a “group of
 20 persons” can aggregate their losses for purposes of becoming lead plaintiff. 306 F.3d at 731 n.8
 21 (“*we are not asked to determine whether a group can satisfy the ‘largest financial interest’*
 22 *requirement by aggregating losses*”); *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818-89
 23 (N.D. Ohio 1999) (engaging in lengthy statutory analysis of “groups”).

24 Addressing this statutory ambiguity, courts hold that “the phrases ‘members’ and ‘group of
 25 persons’ must be read in the context of the overall scheme and purpose of the Reform Act [which]
 26 was to eradicate lawyer-driven securities fraud class actions.” *Bowman v. Legato Sys.*, 195 F.R.D.
 27 655, 658 (N.D. Cal. 2000). In *American Italian Pasta*, Judge Smith reasoned that
 28

granting a request to appoint an unrelated group of investors would violate the purposes behind the PSLRA, which includes the prevention of lawyer-driven litigation. Organizing disparate combinations of shareholders for the purpose of aggregating the “most damage” is contrary to the spirit and purposes of the Act, and it is unreasonable to construe the PSLRA’s reference to a “group” as meaning a “group of otherwise disinterested and disconnected parties.”

Stengle v. Am. Italian Pasta, 2005 U.S. Dist. LEXIS 43816, at *15 (W.D. Mo. 2005). As discussed herein, by their filings, the Harel and Batucha Groups’ members have left little doubt that they were “created by the efforts of lawyers hoping to ensure their eventual appointment as lead counsel” and, as such, are “groups” of the sort district courts in this circuit and throughout the country look upon with disfavor. *Cendant*, 264 F.3d at 267; *see Gemstar-TV Guide*, 209 F.R.D. at 451; *Ruland v. Infosonics Corp.*, 2006 U.S. Dist. LEXIS 79144, at *8-*11 (S.D. Cal. 2006); *In re Vaxgen Sec. Litig.*, 2004 U.S. Dist. LEXIS 29812, at *16 (N.D. Cal. 2004); *Impac*, 2006 U.S. Dist. LEXIS 40607, at *20-*32; *Glauser v. EVCI Career Colls. Holding Corp.*, 236 F.R.D. 184, 189-90 (S.D.N.Y. 2006).³

B. The National Elevator Fund Is the “Most Adequate Plaintiff” Because It Is the Only Applicant that Satisfies All of the PSLRA’s Lead Plaintiff Requirements

The papers filed with the Court reveal that the National Elevator Fund’s financial interest is larger than all but two of the other competing movants. While the Harel and Batucha Groups claim larger losses, only the National Elevator Fund should be afforded presumptive lead plaintiff status because, in addition to its significant financial interest, only it has also made a “threshold” showing of typicality and adequacy under Rule 23. *See Cavanaugh*, 306 F.3d at 732 (“district court has latitude as to what information it will consider in determining typicality and adequacy”); *Impac*, 2006 U.S. Dist. LEXIS 40607, at *19-*26.

The National Elevator Fund is typical because its claims arise from the same course of conduct and the same operative facts which damaged the entire class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); Memorandum of Law in Support of National Elevator Industry

³ *See also In re Century Bus. Servs., Sec. Litig.*, 202 F.R.D. 532 (N.D. Ohio 2001); *Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845, 853 (S.D. Ind. 1999); *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304 (S.D.N.Y. 2001); *Crawford v. Onyx Software Corp.*, 2002 U.S. Dist. LEXIS 1101, at *4-*5 (W.D. Wash. 2002).

Pension Fund's Motion for Appointment as Lead Plaintiff and for Approval of Its Selection of Lead Counsel ("Opening Mem.") at 5-7. The National Elevator Fund is also adequate because its interests are not antagonistic to those of the class, it does not suffer from any conflicts of interest and because it has a sufficient interest in the outcome of the litigation to ensure that it will vigorously prosecute it. *See Impac*, 2006 U.S. Dist. LEXIS 40607, at *19; *Cendant*, 264 F.3d at 264 ("institutional investors . . . with large losses will, more often than not, satisfy the typicality and adequacy requirements [of Rule 23]"); Opening Mem. at 6-7.

Finally, unlike the Israeli Entities, the National Elevator Fund has selected just *one law firm* to prosecute this litigation on behalf of the putative class. *See Glaxosmithkline*, 246 F.R.D. at 205 ("Coughlin Stoia Geller Rudman & Robbins LLP . . . is well qualified and has successfully served as lead counsel . . . in numerous complex securities class actions."); *In re Milestone Sci. Sec. Litig.*, 183 F.R.D. 404, 418 (D.N.J. 1998) ("The potential for duplicative services and the concomitant increase in attorneys' fees works against the approval of multiple lead counsel.").

Accordingly, the National Elevator Fund's motion should be granted and all other motions should be denied.

C. Neither the Batucha Group nor the Harel Group Have Demonstrated that They Can or Will Fairly and Adequately Represent the Interests of the Class

1. The Harel and Batucha Groups Have Not Demonstrated Their Cohesiveness

One of the ways that courts ensure that the PSLRA's legislative purposes are carried out is to ensure that groups seeking appointment as lead plaintiff demonstrate that they can "effectively manage the litigation and the lawyers." *Network Assocs.*, 76 F. Supp. 2d at 1026; *In re Nw. Corp. Sec. Litig.*, 299 F. Supp. 2d 997, 1005 (D.S.D. 2003); *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 44-45 (D. Mass. 2001). In *Impac*, Judge Carney had occasion to consider whether two such groups with the *first and second largest respective losses before the court* could manage the litigation and the lawyers and concluded:

The Court agrees with *Gemstar* and other cases holding that groups of unrelated investors, while not per se impermissible lead plaintiffs under the PSLRA, are not adequate class representatives absent a showing that they are able to coordinate their efforts in the litigation. . . . The absence of any evidence of a

1 relation among the [] proposed members, or between the two groups, suggests that
 2 the purpose of the combination was to secure lead plaintiff status for the group and
 3 appointment of lead counsel status for their attorneys. This lack of relation,
 4 combined with the absence of any explanation of how the group intends to conduct
 5 discovery or coordinate litigation efforts or strategy, poses a danger that the group
 6 will not be cohesive. . . . In sum, the Court finds that the Impac/IMH Group is not
 7 entitled to the presumption that it is the most adequate plaintiff because it has not
 8 made the required preliminary showing that it would adequately represent the class.

9 2006 U.S. Dist. LEXIS 40607, at *25-*27 (footnotes omitted); *Gemstar-TV Guide*, 209 F.R.D. at
 10 447-50.

11 Here, like the groups in *Impac*, the Harel and Batucha Groups have not presented any
 12 explanation regarding how and when they were joined together, intend to conduct discovery, or
 13 coordinate litigation efforts and strategy. In fact, neither group has provided one scintilla of
 14 evidence regarding anything about themselves “other than a conclusory statement of names [and]
 15 transactions for purchase of securities.” *Waste Mgmt.*, 128 F. Supp. 2d at 413; *Crawford*, 2002 U.S.
 16 Dist. LEXIS 1101, at *4-*5 (finding that “loose group[s] of investors whose relationship was forged
 17 only in a effort to win appointment as lead plaintiff” are infirm under Rule 23); *Gemstar-TV Guide*,
 18 209 F.R.D. at 451; *Network Assocs.*, 76 F. Supp. 2d at 1026.

19 Whether considered individually or as groups, therefore, these groups have not demonstrated
 20 that they are cohesive, capable of adequately leading this litigation and directing their attorneys in
 21 this complex action. See *Impac*, 2006 U.S. Dist. LEXIS 40607, at *28-*29; *Smith v. Suprema*
 22 *Specialties, Inc.*, 206 F. Supp. 2d 627, 635 (D.N.J. 2002); *Brightpoint*, 78 F. Supp. 2d at 847-48.

23 **D. The Israeli Entities Are Atypical and Are Subject to Unique Defenses**

24 **1. The Israeli Entities Have Not Demonstrated Attorney-in-Fact 25 Authority Under the Laws of Israel**

26 The Israeli Entities are a hodgepodge of asset managers, mutual funds and insurance
 27 companies. Accordingly, if appointed, defendants will persuasively argue that the Israeli Entities
 28 lack a financial stake in the outcome of this litigation because the Israeli Entities themselves did not
 suffer investment losses. See *Network Assocs.*, 76 F. Supp. 2d at 1030; *In re Peregrine Sys. Sec.*
Litig., 2002 U.S. Dist. LEXIS 27690, at *53-*57 (S.D. Cal. 2002). To appoint as a lead plaintiff a
 movant that itself may have no losses would dramatically undermine one of the fundamental
 precepts of the PSLRA, which is to appoint as lead plaintiffs those “class members with large

amounts at stake.” H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 733. Indeed, even if this case were to yield a 100% recovery for the class, defendants will later claim that the Israeli Entities are entitled to no recovery as the funds they *manage* actually own the stock at issue – not the Israeli Entities.⁴ *See Smith*, 206 F. Supp. 2d at 634-36; *In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 357-58 (S.D.N.Y. 2002) (limiting asset manager’s loss to the .35% fee it earned on the total assets it invested).

In *Cardinal Health*, for instance, the court denied an asset manager’s lead plaintiff motion, reasoning: “Wood Asset Management will be subject to a unique defense regarding its standing to assert securities fraud claims on behalf of its clients because it has no proof that it is the clients’ attorney-in-fact.” *In re Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298, 311 (S.D. Ohio 2005). Here, like the asset manager in *Cardinal Health*, the Israeli Entities have also failed to provide any evidence that they are their clients’ “attorney-in-fact.” *Id.* This omission is fatal. To illustrate further, in *Smith* the issue was whether an asset manager, like CLAL Finance Batucha Investment Management, could be appointed lead plaintiff. 206 F. Supp. 2d at 634. The court found that, “[a]lthough on the surface it appear[ed]” that the investment firms had suffered the greatest financial loss, it was not entitled to lead plaintiff status because it did not, for instance, submit evidence that it had received permission to move on their clients’ behalf. *Id.* at 633-34. In denying the investment advisor’s motion, the *Smith* court reduced its claimed losses from \$2.1 million to \$310,000 – representing the difference between its claimed financial interest and the losses the advisor actually had standing to claim. *Id.* at 636.

Ultimately, because the Israeli Entities apparently did not suffer a loss of their own and have failed to *timely* present any evidence that they have been granted “attorney-in-fact” authority to file suit against VeriFone, the Israeli Entities’ motions for appointment as lead plaintiff should be denied. *See Cardinal*, 226 F.R.D. at 311.

⁴ The same holds true for the motion filed by Westend Capital Management, LLC. However, because it claims to have suffered a loss half the size of the National Elevator Fund’s, under *Cavanaugh*, the Court need not reach its motion. *See Cavanaugh*, 306 F.3d at 732.

1 **2. The Israeli Entities’ Distance from This Forum May Create**
 2 **Practical Difficulties that Would Make It Difficult for Them to**
 3 **“Fairly and Adequately Represent” the Class**

4 In *Network Associates*, 76 F. Supp. 2d at 1029, Judge Whyte refused to appoint two foreign
 5 financial entities, like those that comprise the Israeli Entities, in part, because of the practical
 6 problems associated with their involvement:

7 Finally, both ING and KBC are foreign organizations. They are distant. . . .
 8 The distances involved and some differences in business culture would impede their
 9 ability to manage and to control American lawyers conducting litigation in
 10 California. *At trial, the representative plaintiff would normally testify and attend.*
 11 *In a long trial, it would be obviously difficult for ING or KBC to attend in its*
 12 *entirety.* The Court certainly does not say that a foreign investor could never qualify.
 13 But these factors, when added to the others set forth above, *reinforce the Court’s*
 14 *conclusion that neither KBC nor ING can fairly and adequately represent the*
 15 *class.*

16 *Id.* at 1030. Similarly, here, it is difficult to conceive of how the Israeli Entities’ members could
 17 efficiently meet with their American counsel during business hours, let alone effectively and
 18 adequately represent the class and exercise the control over counsel mandated by the PSLRA. *Id.*
 19 The distances involved alone will serve to convert even the most elementary exercise such as a
 20 conference call or a deposition into a task of Herculean proportions requiring significant advance
 21 planning, translation and increased cost to the class. These entities should, by themselves, be the
 22 face of the class.⁵

23 **3. The Israeli Entities’ Various Connections to Verifone Will**
 24 **Subject the Class to Unique Defenses**

25 The Israeli Entities, VeriFone and Lipman Electronic Engineering Ltd. (which VeriFone
 26 acquired during the Class Period) have several potentially troubling connections and relationships
 27 that defendants will later exploit to the detriment of the class should the Court appoint them as lead
 28 _____

29 ⁵ Not only would the appointment of the Israeli Entities under these circumstances create
 30 practical difficulties, it is also unclear whether the outcome of the case will be given *res judicata*
 31 effect in Israel. *In re: Discovery Labs. Sec. Litig.*, No. 06-1820, slip op. at 5 n.2 (E.D. Pa. July 24,
 32 2002) attached as Ex. A to the Declaration of Ramzi Abadou in Support of the National Elevator
 33 Industry Pension Fund’s Omnibus Opposition to All Other Motions for Appointment as Lead
 34 Counsel (“Abadou Decl.”), filed concurrently herewith; *In re Royal Dutch/Shell Transport Sec.*
 35 *Litig.*, No. 04-374 (JWB), slip op. at 36-37 (D.N.J. June 30, 2004) (denying lead plaintiff motion of
 36 foreign investor with largest loss on *res judicata* grounds) (Abadou Decl., Ex. B); *GlaxoSmithKline*,
 37 2007 U.S. Dist. LEXIS 74621 (same); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76
 38 (S.D.N.Y. 2007); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343 (D. Md. 2003).

1 plaintiffs. For example, Phoenix Insurance Company, Ltd. is controlled by Delek Group (Delek),
 2 which has a 53% ownership interest in Phoenix. Delek disclosed in its Quarterly Report, filed on
 3 May 15, 2007, that Delek has begun beta-testing an interface to the BP electronic payment system
 4 through a mid-stream device supplied by VeriFone. Delek's business relationships with VeriFone
 5 place the interests of Phoenix in conflict with absent class members who are adverse to VeriFone.
 6 Similarly, the Batucha Fund, for instance, published a "Special Equities Update" on August 1, 2007
 7 which provides equities *recommendations* on several companies reviewed by Batucha, including
 8 *VeriFone*. Additionally, a news article published on November 9, 2006 by Market Watch quotes a
 9 Batucha analyst, Tzahi Avraham, regarding his view on the VeriFone acquisition of Retalix. *The*
 10 *fact that Batucha was actively publishing reports and recommendations regarding purchases of*
 11 *VeriFone based on its conversations with Company insiders will render it subject to an attack*
 12 *regarding its reliance under the fraud-on-the-market presumption. See Grace v. Perception Tech.*
 13 *Corp.*, 128 F.R.D. 165, 169 (D. Mass. 1989) ("Personal contact with corporate officers and special
 14 meetings at the company will render a plaintiff atypical to represent the class.") Such an attack, if
 15 successful, would render certification of a class action in this case more difficult and could,
 16 effectively, eviscerate the ability of absent class members to obtain any recovery. *See Shiring v. Tier*
 17 *Techs., Inc.*, 244 F.R.D. 307, 313 (E.D. Va. 2007) ("Thus, where, as here, plaintiff relies on the
 18 fraud-on-the-market doctrine to establish typicality, any reliance on non-market information means
 19 that 'he cannot be said to have relied on the integrity of the market, and is atypical of those who have
 20 so relied.'").

21 Moreover, as an entity that engaged in "day-trading" during the Class Period, the Batucha
 22 Fund did not invest in VeriFone stock in any true sense of the word.⁶ According to the Securities
 23 and Exchange Commission, *day traders do not invest*, instead "[t]hrough the use of sophisticated
 24 computer software, day traders sit in front of computer screens and look for nothing more than real

26 ⁶ In addition, legitimate questions exist as to the actual size of the Batucha Fund's claimed
 27 financial interest because of gross inaccuracies in its trading data. For instance, while the Batucha
 28 Group claims a loss exceeding \$17 million, the National Elevator Fund has calculated its loss at
 approximately \$8.4 million.

time price movements. What it is that they are buying or selling is of no concern to them.”⁷ *In re Bank One S’holders Class Actions*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000) (refusing to appoint as lead plaintiff an entity that “*engaged in extensive daytrading*”); *In re MicroStrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 436-37 (E.D. Va. 2000); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582-83 (E.D. Pa. 2003) (finding day traders “atypical and not an adequate representative because he is subject to unique defenses regarding reliance and materiality.”).

Unlike typical class members, the Batucha Group bought and sold large volumes of shares daily, seeking profits of pennies a share on the normal price fluctuations that occur in every stock. If appointed, defendants will later argue that the Batucha Fund’s unusual investment strategy is not the approach of typical investor members of the class who purchased (or sold) VeriFone securities in *reliance* on publicly available information. *See, e.g., Safeguard*, 216 F.R.D. at 582-83. Because such an investment strategy clearly has little, if anything, to do with defendants’ fraudulent public statements and/or omissions, the Batucha Fund is atypical. *See id.*

III. CONCLUSION

For the foregoing reasons, the National Elevator Fund should be appointed as lead plaintiff and all other motions should be denied.

DATED: February 15, 2008

Respectfully submitted,

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s/ Ramzi Abadou
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⁷ *See* Abadou Decl., Ex. C (Day Trading: Your Dollars at Risk, *available at* <http://www.sec.gov/investor/pubs/daytips.htm>; Oral Statement of Chairman Arthur Levitt, Before the Senate Permanent Subcommittee on Investigations, Committee on Governmental Affairs, Concerning Day Trading (Sept. 16, 1999), *available at* <http://www.sec.gov/news/testimony/testarchive/1999/tsty2099.htm>; and Day Trading, *available at* <http://www.sec.gov/answers/daytrading.htm>).

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following designated Internet site at: <http://securities.csgrr.com/>.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 15, 2008.

s/ Ramzi Abadou
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